STATE LIABILITY FOR TORT

MUCH ink has flowed and many hot words have been spoken concerning the iniquity of states which break their contracts, and particularly of those which repudiate their bonds. The matter of state liability for tort has attracted comparatively little interest.[1] Circumstances have not pushed it to the front until recently. Twenty or thirty years ago our State and Federal governments discharged few functions of an industrial nature. The citizen might occasionally enter into business relations by lending them money, but he rarely met them in commercial competition. Now the United States is operating a great canal, building a railroad in Alaska, competing with the express companies, threatening to take over the telephone and telegraph systems, and about to launch a merchant marine. Most State administrations have similarly extended their activities. With every advance of the sovereign into industrial fields, determination and enforcement of its non-contractual liabilities become more and more important.

"The King can do no wrong" is a preliminary stumbling-block. These words give rise to a common belief that the government cannot be guilty of a tort. For several reasons this idea must be dismissed. The maxim is pointless where there is no king.[2] Then, like all maxims, it is an elusive creature, worth much less than face value. Blackstone deals with it as a smug statement that the royal conscience is sensitive and will not suffer wrong to go unredressed.[3] Finally, there are plenty of decisions to the point that a citizen may acquire legal rights against a sovereign by reason of the latter's tort.[4]

[1] For convenience, the word "state" is not capitalized herein except where it refers to one of the United States. The writer has also used certain other words in fixed and perhaps arbitrary senses. A state is said to be "liable" to any individual who has a legal right against it; to be "responsible" or "answerable" to him only if, in addition to the right, he has an adequate remedy.

[2] Langford *v.* United States, 101 U. S. 341 (1879).

[3] BL. COMM., bk. 3, ch. 17.

[4] The Siren, 7 Wall. (U. S.) 152 (1868); Metz *v.* Soule, etc. Co., 40 Iowa 236 (1875); Coster *v.* Mayor, etc. of Albany, 43 N. Y. 399, 407 (1871); and see Goreley *v.* Butler, 147 Mass. 8, 10, 16 N. E. 734 (1888).

That American jurists were getting this idea into their heads as early as 1855 ap-

But even if we suppose the most indisputable kind of wrong — breach of contract — a really substantial difficulty remains. Common law provides no remedy against the king or the government. So far as the evidence goes, we must assume that the Sultan of Johore, masquerading as plain Albert Baker, made a valid and binding offer for the heart and hand of Miss Mighell. He certainly did not live up to the terms of that offer. Yet when the lady sued for breach of promise the court had to deny recovery.[5] This was simply and solely because the defendant was a royal person, not at all because of the merits of the case. Plaintiff might have won had she been able to prove that the Sultan, after his metamorphosis from Prince Charming to a Prince of the Malay Peninsula, lost his throne and became an ordinary citizen.[6] We are not afflicted with the vagaries of a personal sovereign. Decisions do strike home to us, though, which hold that a government may operate a railroad or a telegraph line without being answerable for negligence.[7]

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pears from the famous case of the armed brig *General Armstrong*. During the War of 1812 the ships' boats of a powerful British squadron attacked this little vessel in the neutral Portuguese harbor of Fayal. The Portuguese authorities gave no assistance, but the privateersmen were not too proud to fight a very brilliant action, beating off three assaults in which the assailants lost nearly two hundred men. Then the Britishers brought their guns into play, whereat the Americans, seeing that the jig was up, scuttled the *General Armstrong* and abandoned her. Portugal, having failed in its duty of protection, was liable to the privateer's owners. The liability could, however, be enforced only through diplomatic channels. After long delay the United States submitted the dispute to Louis Napoleon as arbitrator and accepted his adverse award. The claimants thus lost their right against Portugal. Asserting that the award was wrong and that the government had selfishly sacrificed the claim to its own interests, they turned to Congress for indemnity. The case was referred to the newly established Court of Claims. Two questions arose. Had the United States bungled? and, granting this, Was it liable? The court split on both points, first deciding two to one for the claimants and then on rehearing two to one against them. 2 Rep. Ct. Cl., 1st sess., 35th Congress, No. 149, pp. 52, 154, 165, 189 (1858); The Case of the Private Armed Brig of War *General Armstrong*, reported and edited by Sam C. Reid, Jr., 1857. On the question of liability, Charles O'Conor's argument and the dissenting opinion of Gilchrist, C. J., are well worth reading. Further history of this remarkable claim appears in 2 MOORE, INTERNATIONAL ARBITRATIONS, 1071 *et seq.*, and 18 GREEN BAG, 331.

[5] Mighell *v.* Sultan of Johore, [1894] 1 Q. B. 149. This is a case in international, not municipal, law. But of course the same result would have followed with the King of England for defendant.

[6] Munden *v.* Duke of Brunswick, 10 Q. B. 656 (1847). "Acts of state," however, will not rise to haunt a sovereign who abdicates or is deposed. They create no personal liability. Hatch *v.* Baez, 7 Hun (N. Y.) 596 (1876).

[7] The Queen *v.* McLeod, 8 Can. Sup. Ct. 1 (1882); Bainbridge *v.* Postmaster-General, [1906] 1 K. B. 178.

Many lawyers probably accept this lack of remedy against the state on the assumption that it is a common attribute of sovereignty the world over. That is not so. Few important nations in Europe close their courts to individuals having claims against the administration.[8] Liability is sometimes limited,[9] but this is not the same thing as an absolute denial of remedy. True enough, any right to sue a sovereign must rest on that sovereign's consent. Yet the practical difference is tremendous between the attitude of our law, which grants such consent only rarely, and of the civil law, which gives it pretty much as a matter of course.

Although the writer's text is Professor Maitland's remark that "it is a wholesome sight to see 'the Crown' sued and answering for its torts," [10] much of the following comment applies equally to contractual remedies also. The whole common-law rule of state immunity is unnecessary. Even if a full remedy were given private claimants the courts would enforce only a restricted liability. That is exactly what has happened in respect of municipal corporations, which wear no magic cloak of regality.

Further, a rigid application of the old rule under modern conditions brings most undesirable results. The hardship inflicted receives emphasis from the fact that states are rapidly assuming the

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[8] See 2 GOODNOW, COMPARATIVE ADMINISTRATIVE LAW, 161 *et seq.*; also the following cases under the abandoned and captured property acts of our Civil War period: Brown *v.* United States, 5 U. S. Ct. Cl. 571 (1869) (Prussia); Lobsiger *v.* Same, *id.*, 687 (1869) (Switzerland); Rothschild *v.* Same, 6 *id.*, 204 (1870) (France); Dauphin *v.* Same, *id.*, 221 (1870) (France); Brown *v.* Same, *id.*, 171, 193 (1870) (Holland); Molina *v.* Same, *id.*, 269 (1870) (Spain); DeGive *v.* Same, 7 *id.*, 517 (1871) (Belgium); and Fichera *v.* Same, 9 *id.*, 254 (1873) (Italy).

The early Scotch kings were not irresponsible rulers. J. A. Lovat-Fraser, "The Constitutional Position of the Scottish Monarch Prior to the Union," 17 L. QUART. REV. 252. There is still apparently more freedom of private suit against the Crown in Scotland than in England. Somerville *v.* Lord Advocate, 30 Scot. L. R. 868, 884 (1893). It seems likely that a tort action would not lie, no matter on what ground it was based. Smith *v.* Lord Advocate, 35 Scot. L. R. 117 (1897).

A citizen secures from the courts only legal recognition, not legal enforcement, of his rights against the state. BROWN, THE AUSTINIAN THEORY OF LAW, 194; SALMOND, JURISPRUDENCE, 3 ed., 202. But he is practically sure of appropriate relief if the decision be in his favor.

[9] See, for instance, the distinction between the acts of special agents and of regular officials in the SPANISH CIVIL CODE, art. 1903; 2 GOODNOW, *op. cit.*, 162.

[10] "The Crown as Corporation," 17 L. QUART. REV. 131, at p. 142. As to the United States, "it is difficult to see on what solid foundation of principle the exemption from liability to suit rests." Miller, J., in United States *v.* Lee, 106 U. S. 196, 206 (1882).

responsibilities forced upon private employers by workmen's compensation acts. It is quite conceivable that if negligence caused a boiler explosion in a government power plant, an employee hurt inside the building would have rights to compensation which he could enforce in court, while a passing pedestrian struck by flying débris might search vainly for a legal remedy.[11]

Perhaps the principal point to be made concerns the state's own financial interest. A persistent claimant, barred from the courts, does not stop there. He goes to the legislature. That body is surpassing generous with other people's money. It is unrestrained by legal rules as to admissibility of evidence or amount of damages. It knows no statute of limitations. It applies no principle of *res judicata*. It is exceedingly unlikely to draw with any precision the line between satisfying a liability and making a gift.[12] Judges may be pardoned an inward smile when they rebuke persons who have the temerity to sue states, telling them that such action insults the sovereign's dignity and that the proper procedure is meekly to beg the legislature for relief. Here, at least, meekness often pays large dividends.

It may seem inconsistent to urge both hardship to the citizen and expense to the state. Not necessarily. Political motives rule the legislature. It is not fitted to be a court of justice. Securing the passage of a bill is very different from pushing a case to judgment. Perfectly sound claims may well be lost in the legislature for lack of proper introduction or effective backing; entirely unsound ones, particularly if they appeal to sympathy, may be log-rolled through. The most meritorious cause of action does not, alas, invariably command the services of the ablest politicians. Public money is

[11] Judge Smith has ably demonstrated the general lopsided effect of workmen's compensation acts. 27 HARV. L. REV. 235.

[12] George M. Davie, "Suing the State," 18 AM. L. REV. 814; The "Supreme Court of Spoils," 112 OUTLOOK, 616 (March 15, 1916); and Charles Warren's vigorous "Massachusetts as a Philanthropic Robber," 12 HARV. L. REV. 316. In some states constitutional provisions forbid gifts of public money, and everywhere the principle that taxation must be for public purposes only is supposed to be enforced. But the watchdog of the treasury earns more buffets than blessings and finds it almost impossible to perform his duty with entire success. Courts properly dislike interfering with the legislature's appropriations and give them the benefit of every doubt. See the Opinions of the Justices in 175 Mass. 599, 57 N. E. 675 (1900); 186 Mass. 603, 72 N. E. 95 (1904); 190 Mass. 611, 77 N. E. 820 (1906); and 211 Mass. 608, 98 N. E. 338 (1912).

constantly squandered without doing justice. Nothing, perhaps, short of prohibiting the practice will keep plaintive gentlemen from appealing to tender-hearted legislators. But an open road to the courts robs these appeals of their plausibility.

After all, the proof of the pudding is the eating. It is significant that scarcely any modern state denies every semblance of legal remedy to the private claimant. The English petition of right serves well enough to enforce contracts and for the recovery of taxes or other property wrongfully withheld by the Crown. Nearly everywhere in the United States individuals can compel payment of government debts by proceedings of a judicial character. If taxes are illegally extorted, we whip the devil round the stump by suing the collector. Written constitutions protect us from uncompensated seizures of property. The case is not so clear when a tort involves personal injury or damage to property as distinguished from its expropriation. Still, remedies do exist.

If the government carries on industrial enterprises through the medium of legally distinct corporations or boards of trustees, these bodies may be sued for tort.[13]

When the government acts without intermediaries statutes frequently provide for proceedings directly against it. These statutes are of two classes. Those in the first class create or define particular rights and provide remedies for their enforcement. Thus at Panama, where all the realty and most of the personalty are public property, the United States solved the problem of sovereign's liability with a series of workmen's compensation acts. Now that the canal is occasionally open, those injured in person or property while using it have a statutory right of action.[14]

In substance Massachusetts was suable on tort claims arising from its management of the Troy and Greenfield Railroad and the

[13] The leading English case is Mersey Docks Trustees *v.* Gibbs, 11 H. L. Cas. 686 (1864). See also W. Harrison Moore, "Liability for Acts of Public Servants," 23 L. QUART. REV. 12; "The Shield of the Crown," 35 CAN. L. T. 897; ROBERTSON, CIVIL PROCEEDINGS BY AND AGAINST THE CROWN.

The British colonies follow the same rule. Sweeney *v.* Board of Land & Works, 4 Vict. L. R. 440 (1878). So do our own states. Hutchinson *v.* Western, etc. R. Co., 6 Heisk. (Tenn.) 634 (1871). The stock of the Panama Railroad is held in trust for the United States. But it seems never to have been doubted that tort actions will lie against the corporation. Fitzpatrick *v.* Panama R. Co., 2 Canal Zone Sup. Ct. R. 111 (1913).

[14] Panama Canal Act (Aug. 24, 1912), 37 U. S. STAT. AT LARGE, part 1, 560, 563.

Hoosac Tunnel.[15] By statute New York has long been responsible for negligence in connection with its canals; and Ohio has a similar law.[16]

Canada gives legal remedies for injuries caused by negligence on public works.[17] A like statute has been passed by West Australia.[18] New Zealand makes the Crown pay for damage suffered in connection with certain public works from which revenue is derived.[19] Such laws suggest the decisions of the French administrative courts respecting *travaux publics*.[20]

The second class of legislation does not deal at all with particular rights, but does give private claimants a general judicial remedy against the sovereign. Statutes of this kind are common in the British colonies and exist in at least nine of our States.[21] From the lawyer's point of view they are extremely interesting. Removing the initial problem of *remedy*, they make the courts work out their own principles of *right*. The decisions under them are shaping the whole structure of governmental liability. It would be possible to

[15] Amstein *v.* Gardner, 134 Mass. 4 (1883).

[16] Reed *v.* State, 108 N. Y. 407 (1888), 15 N. E. 735; Sundstrom *v.* State, 213 N. Y. 68, 106 N. E. 924 (1914); *In re* Claims against the State, 8 Ohio L. R. 59, 68 (1910).

[17] CAN. REV. STAT. (1906), c. 140, § 20; 9–10 EDW. VII (1910), c. 19.

[18] City of York Co. *v.* The Crown, 4 W. Austr. R. 63 (1902).

[19] The Queen *v.* Williams, L. R. 9 A. C. 418, 433 (1884) (harbor snag); Hill *v.* The King, 33 N. Z. L. R. 313 (1913); Gibbons *v.* The King, *id.*, 527 (1913) (railways); The King *v.* Shand, 23 N. Z. L. R. 297, 306 (1903) (gravel pit from which ballast was taken for railway).

[20] 2 E. LAFERRIÈRE, TRAITÉ DE LA JURIDICTION ADMINISTRATIVE, 1 ed., 176; the following cases before the Conseil d'État are typical: 12 July, 1855, *Bourdet*, D. P., 1856–3–5; 6 May, 1881, *Tysack*, D. P., 1882–3–106; 21 July, 1882, *Turnbull*, D. P., 1884–3–29; 27 June, 1890, *Chedru*, D. P., 1892–3–12 (injuries to ships in ports or docks); 14 Jan., 1910, *Comp. d'Assurances l'Urbaine*, D. P., 1911–3–124 (fire caused by fall of telephone wire); 17 May, 1878, *Bouveret*, D. P., 1878–3–82 (damage from state dynamite factory); 28 Feb., 22 May, 1908, D. P., 1911–5–24 (fire set by steam roller).

[21] Arizona: 1913 CODE CIV. PROCEDURE, part 13, §§ 1791 *et seq.* California: HENNING'S GEN. LAWS (1914), Act 4824, p. 1773. Illinois: 2 ANNOTATED STAT. (Jones & Addington), parts 3417, 3419. Massachusetts: REV. LAWS, c. 201, § 1. New York: CODE CIV. PROCEDURE, § 264. It has been thought, particularly outside New York, that this section creates liabilities as well as a remedy. The wording of the statute and the reasoning of the decisions under it do not sustain this idea. North Carolina: 1 PELL'S REVISAL (1908), § 1537. South Dakota: 2 COMP. LAWS (1913), CODE CIV. PROCEDURE, §§ 25–28, p. 320. Virginia: CODE (Pollard, 1904), § 765; construed in Higginbotham's Ex'x. *v.* Commonwealth, 25 Gratt. 627, 637 (1874), and Attorney-General *v.* Turpin, 3 Hen. & M. 548, 557 (1809). Washington: PIERCE'S WASH. CODE (1912), tit. 453, § 9.

separate the cases into those which do and those which do not involve responsibility for an agent's acts. But the value of this distinction is not apparent. With the extension of public activities has come a decided modification of the older theory that governments are never liable for the misdoings of their servants.[22]

Even where an unqualified statutory remedy has been granted, the law remains clear for non-liability up to a certain point. Language used in different jurisdictions varies, but the underlying idea seems constant. No sovereign or governmental act, however ill-performed or damaging, is a state tort.[23] The tendency — in the United States at least — is to make this rule cover a multitude of sins. Of course it extends to acts of the legislature and of the judiciary, police activities, and acts of war. Miscellaneous instances of its application are found in the construction and maintenance of prisons, hospitals, and educational institutions;[24] care of public roads and parks;[25] protection and propagation

[22] STORY, AGENCY, § 319, is usually cited to support this theory. For the modern doctrine see BISHOP, NON-CONTRACT LAW, § 749.

[23] Murdock Parlor Grate Co. *v.* Commonwealth, 152 Mass. 28, 24 N. E. 854 (1890); Enever *v.* The King, 3 Commonwealth L. R. (Aus.) 969 (1906); Baume *v.* Commonwealth, 4 Commonwealth L. R. 97 (1906) (quasi-judicial acts of customs officer); 2 E. Laferrière, *op. cit.*, 174, 175; Conseil d'État, 13 Jan. 1899, *Lepreux*, D. P., 1900–3–42.

[24] Prisons: Davidson *v.* Walker, 1 N. S. Wales 196 (1901); Gibson *v.* Young, 21 N. S. Wales L. R. 7 (1900); Bourn *v.* Hart, 93 Cal. 321, 28 Pac. 951 (1892); Schmidt *v.* State, 1 Ct. Cl. (Ill.) 76 (1890); Lewis *v.* State, 96 N. Y. 71 (1884); Clodfelter *v.* State, 86 N. Car. 51 (1882); Moody *v.* State Prison, 128 N. Car. 12, 38 S. E. 131 (1901). Compare Metz *v.* Soule, etc. Co., 40 Ia. 236 (1875). In several of these cases convicts had been injured while engaged on work which produced revenue for the state. One early American case suggests that under certain conditions there may be liability to persons who are neither prisoners nor employees. Austin *v.* Foster, 9 Pick. (Mass.) 341, 346 (1830).

Hospitals: Riley, admx. *v.* State, 2 Ct. Cl. (Ill.) 20 (1906). Smith *v.* State, 169 N. Y. Sup. Ct. (App. Div.) 438, 154 N. Y. Supp. 1003 (1915), concerns an injury to a charity patient at an insane asylum, so a double ground of defense existed. But Martin *v.* State, 120 N. Y. Sup. Ct. (App. Div.) 633, 105 N. Y. Supp. 540 (1907), is probably squarely in point. It does not appear that the person injured here was a patient, and New York charities are liable for torts to strangers. Kellogg *v.* Church Charity Foundation, 203 N. Y. 191, 96 N. E. 406 (1911).

Educational institutions: Jorgensen *v.* State, 2 Ct. Cl. (Ill.) 134 (1911). In Hole *v.* Williams, 10 N. S. Wales 638 (1910), the court seems to blunder all around the easy reason for its decision.

[25] Johnson *v.* State, 1 Ct. Cl. (Ill.) 208 (1899); Harper *v.* State, *id.*, 322 (1904); Henke *v.* State, 2 *id.*, 11 (1906); Fowler, admr. *v.* State, *id.*, 109 (1910); Secretary of State *v.* Cockcraft, 27 Ind. Cas. 723 (1915); Miller *v.* McKeon, 3 Commonwealth L. R. (Aus.) 50 (1906).

of fish and game;[26] operation of vessels in harbor work and fire fighting.[27]

Boards, corporations, and other instrumentalities performing public functions are similarly shielded. Thus agricultural societies are not liable for injuries suffered at fairs given by them, even though admission is charged.[28] The East India Company, a private corporation, was exempt from judicial interference in its exercise of delegated governmental powers.[29] These cases, irrespective of statute, did not go off upon lack of remedy, for the defendants enjoyed no sovereign prerogative.

At the other extreme are instances which leave little room to doubt the existence of liability. Where contract and tort overlap, as in the business of warehousing, judges are particularly ready to handle a negligent government without gloves.[30] Any court, if granted jurisdiction, will make the state pay for wrongs causing un-

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[26] Apfelbacher *v.* State, 160 Wis. 565, 152 N. W. 144 (1915).

[27] Denning *v.* State, 123 Cal. 316, 55 Pac. 100 (1899).

[28] Melvin *v.* State, 121 Cal. 16, 53 Pac. 416 (1898); Minear *v.* Board of Agriculture, 259 Ill. 549, 102 N. E. 1082 (1913); Hern *v.* Iowa State Agricultural Society, 91 Ia. 97, 58 N. W. 1092 (1894); Zoeller *v.* State Board of Agriculture, 163 Ky. 446, 173 S. W. 143 (1915); Berman *v.* Minnesota State Agricultural Society, 93 Minn. 125, 100 N. W. 732 (1904); Morrison *v.* Fisher, 160 Wis. 621, 152 N. W. 475 (1915); compare Lane *v.* Minnesota State Agricultural Society, 62 Minn. 175, 64 N. W. 382 (1895). A suit directly against the state failed in Dale *v.* State, 2 Ct. Cl. (Ill.) 368 (1915), and succeeded in Arnold *v.* State, 163 N. Y. 253, 148 N. Y. Supp. 479 (1914).

[29] Nabob of the Carnatic *v.* East India Company, 2 Ves. Jr. 56 (1792); East India Company *v.* Kamachee Boye Sahiba, 7 Wkly. R. 722 (1859). This is well enough as to corporations which really exercise some administrative discretion. But doubt may be felt when a mere carrier of mail is held not liable to the owner of a lost parcel — unless because the government as bailee has exclusive right to the possessory remedies. Bankers', etc. Co. *v.* Minneapolis, St. P. & S. S. M. Ry. Co., 117 Fed. 434 (1902); United States *v.* Hamburg-Amerikan, etc. Gesellschaft, 212 Fed. 40, 43 (1914). Compare Baltimore, etc. Co. *v.* Baltimore, 195 U. S. 375, 382, and Ackerlind *v.* United States, 240 U. S. 531, 536 (1916). Exemption of contractors from tort actions because they are engaged in public work seems entirely too much of a good thing. 29 HARV. L. REV. 323.

[30] Chapman *v.* State, 104 Cal. 690, 38 Pac. 457 (1894); Brabant & Co. *v.* King, [1895] L. R. A. C. 632. Compare Campbell *v.* State, 2 Ct. Cl. (Ill.) 298 (1914) (bailment for hire); and Gulf Transit Co. *v.* United States, 43 U. S. Ct. Cl. 183 (1908) (negligence in respect of dry-dock hired from the government), which is perhaps not quite so clear.

Incidentally, where remedial acts exist, the government is more readily held bound by the terms of general statutes. Sydney Harbour Trust Commissioners *v.* Ryan, 13 Commonwealth L. R. (Aus.) 358 (1911) (employers' liability); Herkimer Lumber Co. *v.* State, 131 N. Y. Supp. 22 (1911) (damages for suing out injunction).

just enrichment — the occupation of private real estate,[31] infringement of a patent,[32] and the like — or for the destruction of property rights necessitated by a public improvement.[33] Two Illinois decisions along this line supply food for thought. Both resulted from the use of a militia rifle range so laid out that bullets, even when discharged with all possible care, crossed a farm and endangered persons thereon. The first plaintiff, who owned the farm, sought to recover for depreciation of his land, loss of a crop which he had been unable to harvest, and sundry other damage. He was awarded something, but it is hard to tell for what loss the compensation is intended. The court argues that the injury was the necessary consequence of properly executing the State's orders, and did not result from negligence of the State's agents, for which there could have been no recovery. It is an instance of informal taking by eminent domain.[34] But the second case cannot be so explained. There a farmhand who had been hit by one of the stray bullets was allowed compensation.[35] Unless rifle practice by the militia in time of peace is not a governmental act, this seems very questionable law. And *quære*, is it not necessarily negligent on somebody's part to fire or cause to be fired shots bound to endanger life and limb?

Between these limits lies more uncertain territory upon which British colonial jurists for some years groped unhappily in the dark.[36] The authoritative case of *Farnell* v. *Bowman* [37] has done much to resolve their doubts. It came before the Privy Council on demurrer, and a babble of conventional pleading obscures the real facts. Apparently New South Wales did the damage complained of while prosecuting some public work. The plaintiff alleged that trespassing government servants had destroyed his grass, trees, and

[31] Remington *v.* State, 116 App. Div. (N. Y.) 522, 101 N. Y. Supp. 952 (1906); Porto Rico *v.* Ramos, 232 U. S. 627 (1914). See also Coleman *v.* State, 134 N. Y. 564 (1892).

[32] Marconi's Wireless Telegraph Co. *v.* Commonwealth, 16 Commonwealth L. R. (Aus.) 178 (1913); Charles C. Binney, "The Government's Liability for the Use of Patented Inventions," 52 AM. L. REG. 22.

[33] Attorney-General of Straits Settlement *v.* Wemyss, L. R. 13 A. C. 192 (1888).

[34] Hickox *v.* State, 1 Ct. Cl. (Ill.) 81 (1890). Evans *v.* Finn, 4 N. S. Wales 297 (1904), using different language, reaches the same result. See also McCarty *v.* State, 2 Ct. Cl. (Ill.) 100 (1909), and Johnson *v.* State, *id.*, 227 (1914).

[35] Crawford *v.* State, 1 Ct. Cl. (Ill.) 91 (1890).

[36] A. P. Canaway, "Actions against the Commonwealth for Torts," 1 COMMONWEALTH L. REV. (Aus.) 241.

[37] L. R. 12 A. C. 643, 649 (1887); Eckford *v.* Walker, 2 N. S. Wales 369 (1902), *acc.*

fences by lighting fires. Held that he stated a good cause of action. The opinion indicates that so long as a state confines itself to old-fashioned, customary functions, it is subject to no liability for tort; but

"It must be borne in mind that the local governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works for the construction of which it is necessary to employ many inferior officers and workmen. If, therefore, the maxim that 'the king can do no wrong' were applied to Colonial governments in the way now contended for by the appellants, it would work much greater hardship than it does in England."

Old cases against the East India Company concerning the exercise of its "civil capacity" lend historical backing to this distinction.[38] Applying the principle, courts have brought colonial governments to book for negligently operating telegraphs, railways, and trading vessels.[39]

In this country the well-developed rules of municipal liability provide a convenient and illuminating analogy. While these rules are by no means identical everywhere, it is pretty generally agreed that cities and towns may be held for tort in connection with proprietary, commercial, or money-making functions, like the operation

[38] Moodaly *v.* Moreton, 2 Dick. 652 (1785); Gibson *v.* East India Company, 5 Bing. N. C. 262 (1839). These are not mere dry curiosities. When the Crown took over the government of India about the time of the Mutiny it was provided that "The Secretary of State in Council" should be suable wherever the East India Company might have been sued. Thus the present administration is answerable for torts committed in such commercial transactions as the operation of railways. Mathradas Ramchand *v.* Secretary of State, 11 Ind. Cas. 58 (1911); Ross *v.* Same, 19 Ind. Cas. 353, 355 (1913).

In 1873 Sir R. Phillimore believed that a ship used for trading was subject to admiralty proceedings on account of negligent collision, despite the fact that she belonged to a foreign sovereign. The Charkieh, 1 Asp. M. C. 581, 598 (1873). And see United States *v.* Wilder, 3 Sumner (U. S. C. C.) 308, 315 (1838). This is probably not law. The Parlement Belge, L. R. 5 P. D. 197 (1880); Mason *v.* Intercolonial Ry. of Canada, 197 Mass. 349, 83 N. E. 876 (1908). The king's prerogative covers his property as well as his person. But of course the prerogative may be waived, as by the remedial statutes assumed in the text at this point.

[39] Australia: Hannah *v.* Dalgarno, 3 N. S. Wales 494 (1903); s. c. 1 Commonwealth L. R. 1; Commonwealth *v.* Miller, 10 Commonwealth L. R. 742 (1910). Cape of Good Hope: Leonard *v.* Commissioner of Public Works, [1907] East. Dist. R. 146; Wynne *v.* Colonial Government, [1909] *id.*, 193; Union Government *v.* Warneke, 5 Buchanan's A. C. 166 (1911). New South Wales: South Coast Road Metal Quarries *v.* Whitfield, 14 N. S. Wales 300 (1914).

of sewers, waterworks, and gas plants. As a practical matter tortious injuries are most likely to result from the exercise of such functions. The better-reasoned American cases take this for the typical ground of State liability,[40] which brings us out on much the same lines as *Farnell* v. *Bowman*. It is hard to imagine any undertaking usually "left to private enterprise" which does not include a money-making element. Financial gain is vital to the continuance of private business.

But the few American authorities are at loggerheads. The Alabama case of *State* v. *Hill* [41] seems at first blush to conflict with the rule just laid down. It cannot bear analysis. A State receiver was running a railroad. One of the trains killed some horses. The bereaved owner brought action against the State. Recovery was denied on the ground that a sovereign is never liable for the negligence of its servants. The result is right — for other reasons. Plaintiff simply barked up the wrong tree. Alabama did not own the railroad [42] and was not a proper defendant. The receiver should have been sued.[43] The decision might thus be justified. Or it would

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[40] Sewer: Ballou *v.* State, 111 N. Y. 496, 18 N. E. 627 (1888). This might possibly have been dealt with under the canal acts. But it is not so explained. Litchfield *v.* Bond, 186 N. Y. 66, 83, 78 N. E. 719 (1906) (some remarks in the latter case concerning the general question of state liability properly apply only to unauthorized or unconstitutional acts of officials). The court had broad jurisdiction, irrespective of canal problems. LAWS 1870, c. 321; 1876, c. 444; 1883, c. 205, §§ 7, 13. Canals: Holmes *v.* State, 1 Ct. Cl. (Ill.) 324 (1905); Phillips *v.* State, *id.*, 332 (1905). Overruled by Morrissey *v.* State, 2 *id.*, 254 (1914), which is discussed later. Inclined railroad: Burke *v.* State, 119 N. Y. Supp. 1089 (1909). Automobile race at fair: Arnold *v.* State, 163 N. Y. App. Div. 253 (1914), 148 N. Y. Supp. 479.

In France the state may be sued much as if it were an individual for injuries sustained on its private domain. 2 E. Laferrière, *op. cit.*, 179; Trib. des Conf., 24 May 1884, *Linas*, D. P., 1885–3–110 (accident in state forest); Paris, 21 June, 1898, *Dessauer*, D. P., 1899–2–289, S. C. civ. rej., 12 June, 1901, D. P., 1902–1–372 (*Opéra-Comique* fire).

[41] 54 Ala. 67 (1875).

[42] 42 L. R. A. 35 n. to the contrary is in error. The owner was an ordinary public service corporation. The State, as its creditor, petitioned for and secured appointment of a receiver. Blake *v.* Alabama, etc. R. Co., Fed. Cas. 1493; State *v.* Same, 54 Ala. 139 (1875).

[43] Another tort claimant did this after federal receivers were appointed. Davenport *v.* Alabama, etc. R. Co., Fed. Cas. 3588. And such is evidently the modern Alabama practice. McGhee *v.* Willis, 134 Ala. 281, 32 So. 301 (1901). Where receivers claimed to be public officers and so exempt from liability for the negligence of their subordinates, the Ohio court made short work of the defense. Meara's admr. *v.* Holbrook, 20 Ohio St. 137 (1870).

have sufficed to point out that all statutes allowing an individual to sue the State had been repealed, which was fatal even in pending actions.[44] But suppose the case rightly brought and prosecuted. The plaintiff could have recovered only from the corporation's assets and not from the public treasury, for this kind of judgment against a receiver is not personal. The railroad was operated on behalf of its creditors and stockholders. Those who pocket the benefits of operation should bear its burdens. If they could evade responsibility by hiding behind an invulnerable dummy defendant, what a scramble there would be for the sanctuary of receivership!

Next logically comes *Morrissey* v. *State*,[45] which overrules earlier Illinois decisions already referred to. The plaintiff was hurt by the collapse of a defective canal bridge. The opinion admits that the State may be liable for tort in a "private enterprise." It denies that the maintenance of this canal, although for profit, was such an enterprise. Hence the claim was rejected.

While perhaps not every court would concur, there could be no great quarrel with the result if it were based upon the interpretation of facts. Since adequate means of communication and transportation are vital to public welfare, keeping up a certain specific means may reasonably be considered governmental. The court, however, takes its stand upon a supposed principle of law. The State, it says, is in no sense a corporation; therefore any activity of whatever character under its sole and direct control must necessarily be governmental; if the control is indirect — exercised, for instance, by voting corporate stock — an activity may be commercial. Now, as Professor Maitland amusingly puts it, Blackstone and older respectable authorities "parsonified" the King into a corporation sole.[46] Much more truly may the modern commonwealth be called a corporation aggregate.[47] But grant the premise; suppose that the state is not a corporation. Does that bare fact render it less able to inflict injuries or less properly called to account for them?

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[44] *Ex parte* State, 52 Ala. 231 (1875).

[45] 2 Ct. Cl. (Ill.) 254 (1914).

[46] BL. COMM., bk. 1, ch. 18, p. 469.

[47] F. W. Maitland, "The Crown as Corporation," 17 L. QUART. REV. 131, points out that three of our original States began their colonial existence under corporate charters. See W. Harrison Moore, same title, 20 L. QUART. REV. 351; also 1 COOLEY, TORTS, 3 ed., 208, and the recent case of Indianapolis *v.* Indianapolis Water Co., 113 N. E. 369, 373 (1916).

This thin-spun technicality will not sustain so weighty a conclusion. Plain common sense rejects such an exaltation of form over substance.

Cited to support the rule are cases dismissing tort actions in respect of agricultural societies, penal institutions, and State universities, of which the first collect admission fees at their fairs, the second make the prisoners do profitable work, and the last charge for tuition. These decisions are irrelevant. Education and the prevention of crime are none the less governmental because so administered as to produce incidental revenue.[48]

This proposed rule is definite and easy to apply. So was the bed of Procrustes. Administrative liability cannot be laid off in convenient lengths with a yardstick. Each varying shade of circumstance calls for a fresh exercise of judgment to determine whether the particular function under consideration is public or private.

The same criticism may be leveled at *Riddoch* v. *State*,[49] which goes the full length of declaring that no state is subject to any tort liabilities except those explicitly created by statute. The opinion comments on many authorities, but haggles altogether too much over words and delves too little after principles. The unsuccessful plaintiff here had been injured by the breaking of a defective railing in an armory leased for a private athletic exhibition. Under substantially similar facts a municipal corporation was responsible.[50] So the court had to hold that there are different rules of legal right and wrong for municipalities and for the State. Mere assertion of this doctrine seems almost sufficient rebuttal. It is the sort of jugglery that excites popular distrust of the legal profession. It involves the disregard of well-established analogies.[51] Reduced to "short and ugly terms" it means that might makes right — an astounding conclusion to issue from the lips of an American court.

Curiously enough, none of these cases much more than hints at the most plausible argument in their favor. It would seem a sound general principle that public money must not be applied to private

[48] Curran *v.* Boston, 151 Mass. 505, 509, 24 N. E. 781 (1890).

[49] 68 Wash. 329, 123 Pac. 450 (1912).

[50] Little *v.* Holyoke, 177 Mass. 114, 58 N. E. 170 (1900).

[51] South Carolina *v.* United States, 199 U. S. 437, 463 (1905) (where a State takes over the liquor business, its agents must pay internal revenue tax); Hopkins *v.* Clemson College, 221 U. S. 636, 647 (1910); Louisiana *v.* McAdoo, 234 U. S. 627, 631 (1913); and see adverse comment on the principal case in 74 CENT. L. J. 431.

relief. We have observed the legislative inclination to depart from this principle and indulge in extravagant expressions of sympathy for misfortune. Courts may well, then, be pardoned and even praised if they take a very firm stand against wasteful sentimentalism. True, it is universally recognized that the government's contracts subject it to legal obligations — the reverse holding, indeed, would class the state as an incompetent, like a lunatic or a minor. Yet this in itself fails to vindicate liability for tort. The private contractor almost always gives not mere technical consideration, but a substantial *quid pro quo*. Since fair exchange is no robbery, he should have his action. Non-contractual liability, on the other hand, seems at first blush to mean a dead loss. However harsh the lack of relief, it is not illogical if and so far as damages for the sovereign's torts have to come out of the public treasury. But this last link breaks when the chain is stretched to include commercial transactions. A concrete instance will make the real situation clear:

Public trustees managed for the British government certain harbor improvements at Liverpool. The trustees were required to charge such rates as would cover maintenance, defray interest, and gradually repay the original investment. When repayment was accomplished the rates were to be lowered so as to yield just enough for upkeep. A plaintiff brought an action of tort against the trustees and got judgment. His recovery simply postponed the lowering of the rates. Neither the Crown nor the investors lost a farthing. The shipowners using the docks and wharves paid the damages.[52]

In short, the government, like any other vendor of goods or services, can pass along to the consumer all charges incident to production. Such cost shifting will inevitably take place under a sound system of bookkeeping, which separates the accounts of the state as a sovereign from those of the state as a business man. Sacred funds collected by taxation will not be diverted to meet new or unexpected liabilities. That being the case, it is dog-in-the-manger policy to refuse a right of action in favor of those injured by public commercial dealings.[53]

[52] Mersey Docks Trustees *v.* Gibbs, 11 H. L. Cas. 686, 708 (1864).

[53] Some jurisdictions allow suits against municipalities for torts committed in the exercise of functions which, while not commercial, are of peculiar local benefit. 25 HARV. L. REV. 646. States may discharge similar functions for the advantage of particular localities. Massachusetts maintains a metropolitan park system in and about Boston, meeting its expenses by a special levy on the towns and cities so located as to

Another, but allied, line of argument is worth pursuing. Many commercial activities make the state a business competitor with its own citizens. In business our law has always sought to provide a fair field and no favor. The fear of unfair competition by a sovereign dates back at least to the Roman Empire:

"Theophilus, seeing a vessel laden with merchandise for his wife Theodora, ordered it to be burned. 'I am emperor,' said he, 'and you make me the master of a galley. By what means shall these poor men gain a livelihood if we take their trade out of their hands?' He might have added, Who shall set bounds to us if we monopolize all to ourselves? Who shall oblige us to fulfil our engagements?" [54]

These sentiments have their modern echo. It is shrewdly suspected that our parcel post, driving a sharp bargain with the railroads, has met express companies on better than even terms. The government enjoys tax exemptions. It sometimes ignores or conceals overhead charges. Plans are now and then concocted at Washington to force federal ownership of public utilities by deliberate cutthroat tactics.[55] Honesty and fairness will be advanced if the law subjects state industries to the measure of tort liability which has always been imposed on the private business man. There is no adequate fiscal reason for barring recovery. Every consideration of justice demands that it be allowed.

As a matter of fact, governmental reparation for damage inflicted customarily goes well beyond the class of cases just discussed. Nor is this always by the fast-and-loose methods of legislative favor. It is familiar that the common-law liability of municipal corporations has sometimes been considered too restricted. New England cities and towns, for example, were once upon a time exempt from suit for accidents occasioned by obstructions or defects in their streets. But now legislation has abolished or narrowed the exemption. A similar tendency may be observed in statutes and practice relating to states. If harm results from the improper

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benefit from the parks. Here tort liability would result in making the beneficiaries bear the entire cost of maintenance. Other states may enforce such liability. It seems clear that Massachusetts will not because of the attitude already taken as to municipalities. Clark *v.* Waltham, 128 Mass. 567 (1880).

[54] MONTESQUIEU, THE SPIRIT OF LAWS, bk. 20, 17.

[55] The Boston "Herald" for Oct. 2, 1913 — and presumably the newspapers in general — contained an outline of one such plan respecting telephones and telegraphs.

performance of a governmental act which is industrial rather than political, the sovereign very often submits itself to the judgment of the courts as to whether and what compensation should be given. When a British warship during time of peace collides with a private vessel, it has become commonplace to try out the claim and reimburse the claimant if he deserves it. The suit is nominally against the officer in charge of the offending warship, who, needless to say, does not pay the damages himself.[56] Congress specially refers such cases to the Court of Claims.[57] This is presumably a recognition of moral obligation.

If, as the writer believes, states should more generally subject themselves to actions for administrative torts, the problem of framing remedial statutes deserves some notice. Experience already has posted various signboards and warnings. Legislators must consider three main points:

1. The necessity or advisability of creating special tribunals to hear claims of this nature. Apparently there is no magic in such separate courts; even France has not developed an entirely distinct system of administrative law.[58] With us, everyday courts pass constantly upon the responsibility of municipal corporations. The law of state responsibility should run approximately parallel. When the United States Court of Claims was founded, any sort of legal proceeding against the sovereign was *rara avis*. Now the glamor of novelty has worn off and the District Courts enjoy a limited concurrent jurisdiction.[59]

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[56] MATSUNAMI, COLLISIONS BETWEEN WARSHIPS AND MERCHANT VESSELS, 260 *et seq.*; H. M. S. Sans Pareil, [1900] L. R. P. D. 267.

[57] Sampson *v.* United States, 12 U. S. Ct. Cl. 480 (1876); St. Louis, etc. Co. *v.* Same, 33 *id.*, 251 (1898). See also Walton *v.* Same, 24 *id.*, 372 (1889) (negligent failure to light beacon), and Commercial Pacific Cable Co. *v.* Same, 48 *id.*, 461, 471 (1913) (mooring negligently dropped on submarine cable). An Illinois statute gives jurisdiction over claims for damage by the National Guard. Smith *v.* State, 2 Ct. Cl. (Ill.) 149 (1912).

Somewhat similar French cases before the Conseil d'État concern personal injuries and damage to property negligently caused by military and naval maneuvers: 18 Feb., 1864, *Comp. la Paternelle*, D. P., 1867-3-20; 17 July, 1896, *DeNarbonne*, D. P., 1897-3-72; 17 March, 1899, *Commune de Villey-Saint-Etienne*, D. P., 1900-3-64; 26 Jan., 1906, *Arnoult*, D. P., 1907-3-93; 24 May, 1912, *Bathiat*, D. P., 1914-3-73.

[58] Edmund M. Parker, "State and Official Liability," 19 HARV. L. REV. 335, 340. Compare A. V. Dicey, "*Droit Administratif* in Modern French Law," 17 L. QUART. REV. 302.

[59] 1 U. S. COMP. STAT. (1913), § 991 (20).

Some constitutions, however, forbid impleading the State in any court. Such provisions might be excised by amendment, but this is a clumsy, uncertain process. These jurisdictions can probably best get around the difficulty by establishing boards of claims which look and act like courts, yet are technically outside the constitutional prohibition.

2. The method of giving effect to judgments or awards against the state. This of course cannot be accomplished by anything like the common-law execution. It calls for some kind of legislative appropriation. The less red tape the better. With that sentiment any lawyer who has ever tried to collect a bill of costs from the United States will surely agree! The patience of Job might fail under the elaborate ceremonial of recovering illegally assessed taxes from this same defendant. Massachusetts, in pleasant contrast, has a simple, workmanlike procedure. The court certifies the amount found due a claimant; the Governor signs a warrant; and the warrant is satisfied out of any available appropriation.[60] The result is quick payment, secured with little trouble.

3. The form by which the statute shall define the remedy created. If courts invariably saw eye to eye in the matter of interpretation, a grant of jurisdiction as to "all claims against the state" might suffice. But there is great danger that this formula will lead to an implied exception of tort claims. Although *Riddoch* v. *State* may be wrong, the case reveals a tendency that must be reckoned with. No statute is a good risk which invites cautious judges to hamstring it.

Too specifically worded a law is equally hazardous. Legislative novelties are construed with bone-paring closeness. The New Zealand liability act applies to injuries "in, upon, or in connection with a public work, meaning thereby any railway, tramway, road, bridge, electric telegraph, *or other work of a like nature* used by . . . or constructed by" the government. A mine is held not to be a "work of a like nature." Hence one run down by a steam lorry connected with a state coal mine has no remedy under the act.[61] But presumably a man negligently injured in a coal mine operated as an adjunct of a railway *could* recover.[62] Canada, too, struggles

[60] REV. LAWS, c. 201, § 3.

[61] Barton *v.* The King, 28 N. Z. L. R. 629 (1909).

[62] The King *v.* Shand, 23 N. Z. L. R. 297, 306 (1903) (excavation from which railway ballast was taken).

with the judicial definition of "public work." [63] There the injury must occur "on" a public work, and this little word introduces new complications. If a tug collides with a merchant vessel while towing loaded barges *away from* a public work, the merchantman's owners cannot sue the Crown.[64] If the boiler of a state dredge explodes when the dredge is in midstream, suit by an injured stoker will not lie.[65] If sparks from a railroad engine set fire to a building *beside* but not *on* the right of way, the government goes scot-free. [66] These cases may be strictly right, yet they must have surprised Parliament. They force arbitrary and unjust distinctions. Amendment can accomplish much. Still, a statute lagging always one stride behind the decisions is hardly desirable.

The happy mean would seem to be a grant of jurisdiction worded to include "all claims against the state, both at law and in equity, sounding in contract or in tort." It is also best to provide explicitly such rights of discovery and other procedural rights as may be deemed advisable for private claimants. Finally, this plan ought in most instances to be supplemented by the statutory creation of certain specific liabilities which do not arise at common law. For example, if military training is to become a prominent feature of our national life, individuals should be allowed to sue the government when they are hurt or their property is damaged during maneuvers.

This is new law. Hardly any important cases were decided before 1885. Even now the scales are fairly free from the "weight of authority." Many American lawyers do not yet realize that the old order may be changing; others have found to their sorrow that courts often show little affection for statutes which trench upon the state's lordly prerogative of wrongdoing. Under every novel set of facts and in every fresh jurisdiction results are painfully uncertain.

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[63] Brown *v.* The Queen, 3 Can. Exch. 79 (1892) (fishway in dam not public work); Larose *v.* The Queen, 6 Can. Exch. 425 (1900), aff. 31 Can. Sup. Ct. 206 (rifle range not public work); Hamburg American Packet Co. *v.* The King, 7 Can. Exch. 150 (1901), aff. 33 Can. Sup. Ct. 252 (channel in which improvements have been completed not public work).

[64] Paul *v.* The King, 9 Can. Exch. 245, 270 (1904), aff. 38 Can. Sup. Ct. 126.

[65] Question left open in Massicotte *v.* The King, 11 Can. Exch. 286, 291 (1911); apparently concluded by Montgomery *v.* The King, 15 Can. Exch. 374, 379 (1915).

[66] Chamberlain *v.* The King, 42 Can. Sup. Ct. 350 (1909), overruling Price *v.* The King, 10 Can. Exch. 105, 137 (1906). Same doctrine applied to another situation by Olmstead *v.* The King, 53 Can. Sup. Ct. 450 (1916).

There is a tendency blindly to follow outworn rules. But more extended administrative activity has compelled a keener interest in the problem of administrative responsibility. This interest must soon be reflected by judicial opinion. We may well anticipate rapid and interesting developments within the next few years.

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